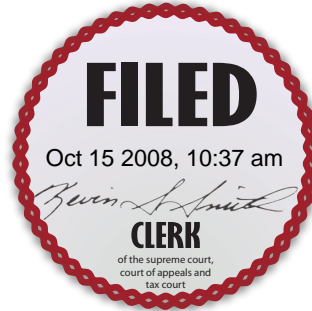


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

GAYLE L. BARDEN,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 57A05-0804-CR-220
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE NOBLE SUPERIOR COURT
The Honorable Robert E. Kirsch, Judge
Cause No. 57D01-0512-FD-209

October 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Gayle Barden appeals his conviction for Class D felony theft and the restitution order requiring him to pay \$479.99. We affirm in part, reverse in part, and remand.

Issues

Barden raises two issues, which we restate as:

- I. whether he received ineffective assistance of trial counsel; and
- II. whether the trial court's restitution order was proper.

Facts

In early November 2005, Richard Brooks, an employee of Irving Ready Mix Gravel Co. ("Irving"), installed digital trail cameras around a gravel pit in Ligonier primarily for deer hunting purposes. A few days later, Brooks returned to the site to look at the pictures on the camera. One of the cameras was missing. Brooks followed the footprints near where the missing camera had been located to Joni and Troy Patricks's house.

Brooks spoke with Joni about the missing camera. Joni explained that she did not know anything about it but that she had seen a truck parked on the side of the road earlier that day. Joni described the truck to Brooks. When Troy returned home from work that afternoon, the couple determined that Barden had been driving the truck that was parked on the side of the road. This determination was based in part on the fact that Troy previously had given Barden permission to hunt on their property. Troy spoke with

Barden, who admitted that he took the camera after it took his picture. Troy instructed him to return the camera. Troy relayed this information to a supervisor at Irving.

The camera was never returned, and Brooks reported the missing camera to the Ligonier Police Department. Officer Michael Crossley of the Ligonier Police Department spoke with the Patricks and then with Barden and determined that there was a sufficient basis to support a charge of theft against Barden.

On December 5, 2005, the State charged Barden with Class D felony theft. A jury found Barden guilty as charged. The trial court sentenced him to one and a half years and ordered him to pay restitution in the amount of \$479.99. Barden now appeals.

Analysis

I. Ineffective Assistance of Counsel

Barden argues that he received ineffective assistance of counsel when trial counsel failed to object to certain testimony and failed to object to the prosecutor's characterization of the law. "To establish a claim for ineffective assistance of counsel, a defendant must satisfy two prongs: First, the defendant must demonstrate that counsel performed deficiently; second, the defendant must demonstrate that prejudice resulted." State v. McManus, 868 N.E.2d 778, 790 (Ind. 2007) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)), cert. denied, 128 S. Ct. 1739. These two prongs are independent inquiries, either of which may be sufficient for disposing of a claim of ineffective assistance of counsel. Id.

Deficient performance is representation that fell below an objective standard of reasonableness by the commission of errors so serious that the defendant did not have the

“counsel” guaranteed by the Sixth Amendment. Id. Consequently, our inquiry focuses on counsel’s actions while mindful that isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render counsel’s representation ineffective. Id. Indeed, there is a strong presumption that counsel rendered adequate assistance. Id. “To satisfy the second prong, the defendant must show prejudice: a reasonable probability (i.e. a probability sufficient to undermine confidence in the outcome) that, but for counsel’s errors, the result of the proceeding would have been different.” Henley v. State, 881 N.E.2d 639, 644 (Ind. 2008).

Barden claims that Officer Crossley improperly vouched for Joni and Troy’s credibility. He argues that trial counsel’s failure to object to this testimony amounted to ineffective assistance of counsel. Our supreme court has stated:

Counsel cannot be faulted for failing to make an objection which had no hope of success and which might have the adverse effect before the jury of emphasizing the admissibility of appellant’s statement. Failure to object to admissible evidence does not constitute ineffective assistance of counsel; a defendant must show that had a proper objection been made the court would have had no choice but to sustain it.

Garrett v. State, 602 N.E.2d 139, 141 (Ind. 1992).

The testimony at issue involves Officer Crossley’s assessment of his conversations with the Patricks and Barden shortly after Brooks reported the theft. On direct examination, Crossley described Troy’s demeanor during his initial investigation as “normal” and stated that Troy did not seem like he was “trying to hide anything or trying to lead you in the wrong direction . . .” Tr. pp. 140-41. Regarding Joni’s demeanor,

Officer Crossley stated that her demeanor was “normal” and the only thing that was “a tad unnatural” was that she did not want “to be snitching out somebody else, you know, get them in trouble.” Id. at 142-43. Officer Crossley explained that even though Joni did not give a written statement, she was aware that if she lied to him, it would be considered false informing. As for Barden’s demeanor, Officer Crossley stated that Barden was “more upset than normal just because I talked to his mother.” Id. at 148. Officer Crossley explained that Barden “never really got upset when I was accusing him of stealing it.” Id. at 149. He considered Barden’s reaction “strange” and “unusual.” Id. at 149, 150.

Barden also suggests that trial counsel elicited additional improper vouching testimony on cross-examination. Specifically, Barden points to Officer Crossley’s testimony that he has dealt with Troy in the past and all of Troy’s information has been “very accurate.” Id. at 155. Regarding Barden’s interview, Officer Crossley reiterated that typically a person gets very upset about a criminal accusation and Barden did not appear to be upset about the theft accusation.

Finally, Barden directs us to Officer Crossley’s redirect examination in which he was questioned by the prosecutor:

Q: And, based upon your prior dealings with Mr. Patrick having found him truthful and reliable in the past, uh, that, you were more likely to believe him when he told you that Gayle Barden did it and this is why he did it because of the telephone confession. The telephone conversation that he is alleging that he had with Mr. Barden?

A: Right. That is what made Gayle Barden a party of interest.

Q. But at this point the Patricks are still the first suspects. Right?

A. Correct.

Id. at 158-59.

Indiana Evidence Rule 704(b) provides, “Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.” “A witness is not permitted to testify regarding the credibility of another witness.” Nuerge v. State, 677 N.E.2d 1043, 1051 (Ind. Ct. App. 1997), trans. denied. Only the jury can determine the weight to be given to the witness’s testimony. Id.

Here, Officer Crossley was not testifying about whether another witness—either Troy, Joni, or Barden—testified truthfully. Officer Crossley, instead, was explaining why he considered Barden, and not the Patricks, a suspect during his initial investigation. In this case, as Officer Crossley explained, the Patricks were the obvious suspects because the footprints near the location of the camera led to their property. Officer Crossley was explaining why during the course of the investigation his focus shifted from the Patricks to Barden. Officer Crossley was not offering the testimony as an attempt to vouch for the credibility of the Patricks’s trial testimony. Accordingly,

Barden has not established that had the objection been made it would have been sustained or that he received ineffective assistance of counsel.¹

Barden also argues that trial counsel should have objected during the prosecutor's closing argument when the prosecutor "mischaracterized" a jury instruction.² Appellant's Br. p. 14. In the State's closing argument, the prosecutor told the jury that the witnesses were testifying under oath and that they should not be disbelieved unless there was a "darn good reason." Tr. p. 161. Later the prosecutor argued, "Again, you are instructed that unless you find someone's testimony to be so out of whack with other testimony you are to assume that everything you have heard from the stand is the truth." Id. at 167. Barden claims that trial counsel should have objected to these statements because they improperly shifted the burden of proof to him.

Even if trial counsel should have objected and that objection would have been sustained, we cannot conclude that these statements by the prosecutor prejudiced Barden. The jury was clearly instructed regarding the burden of proof. For example, in Final Instruction 6, the trial court informed the jury that the defendant is presumed to be innocent and the State must prove the defendant guilty beyond a reasonable doubt. The instruction also provided that Barden is not required to present any evidence to prove his

¹ Because the Officer Crossley's testimony was elicited to show his course of investigation and was not offered to vouch for credibility of another witness's testimony, an objection to the prosecutor's statements on vouching grounds would not have been successful.

² As Barden points out in his reply brief, the State did not respond to his argument regarding the prosecutor's alleged mischaracterization of the jury instruction. The failure to respond to an issue raised by an appellant is akin to failure to file a brief. Gamble v. State, 831 N.E.2d 178, 185 n.4 (Ind. Ct. App. 2005), trans. denied. However, this situation does not relieve us of our obligation to decide the law as applied to the facts in the record in order to determine whether reversal is required. Id. Thus, we review Barden's claim for prima facie error, which is error at first sight, on first appearance, or on the face of it. See id.

innocence “or to prove or explain anything.” App. p. 72. Final Instruction 10 reiterated the State’s burden of proving the defendant guilty beyond a reasonable doubt. Final Instruction 15 reiterated that Barden was not required to present any evidence, to prove his innocence, or to prove or explain anything. Again in Final Instruction 17, the jury was told to attempt to fit the evidence to the presumption that Barden was innocent.

Final Instruction 17 also told the jury to attempt to fit the evidence to the “theory that every witness is telling the truth. You should not disregard the testimony of any witness without a reason and without careful consideration.” Id. at 82. This is largely consistent with the prosecutor’s statements about which Barden now complains. Based on this language, Barden has not established that the outcome of the trial would have been different had trial counsel objected to the prosecutor’s closing argument and had that argument been sustained. Barden has not established that he received ineffective assistance of counsel.

II. Restitution Order

Barden asserts that the trial court abused its discretion in ordering him to pay \$479.99 in restitution. Generally, a restitution order is a matter within the sound discretion of the trial court, and we will reverse only upon a showing of an abuse of that discretion. Long v. State, 867 N.E.2d 606, 618 (Ind. Ct. App. 2007). “An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effects of the facts and circumstances before it.” Id. Pursuant to Indiana Code Section 35-50-5-3(a), in addition to any sentence imposed for a criminal offense, the trial court may order the defendant to make restitution to the victim of the crime. A restitution order is based on

consideration of property damage and earnings lost by the victim. Ind. Code § 35-50-5-3(a).

Barden argues that there is not sufficient evidence to support the restitution order. In some regards this is consistent with the State's argument at the sentencing hearing in which the prosecutor stated:

As far as, the only evidence I would be aware of, there is really nothing to present, but I know the victim has requested restitution in the amount of \$480.00, which represents \$199.99 for the camera, and \$280.00 in lost wages as a result of Mr. Barden's actions, beyond that no further evidence.

Tr. p. 192.

Brooks filed a victim impact statement with the probation department. This statement lists the value of the stolen property at \$200.00 and the value of his lost wages at \$280.00. The victim impact statement form requires the victim to attach documentation such as invoices, repair bills, or estimates to document the loss. Because no such documentation is included in the appendix, however, it is unclear whether any such evidence was provided by Brooks. However, at trial some evidence as to the value of the camera was established when for "demonstrative purposes" the State offered an internet photograph and description of a trail camera that was similar to the one that was stolen. Tr. p. 71. Brooks testified that the exhibit was a fair and accurate depiction of the camera. This exhibit showed that the camera cost \$189.99. See Exhibit 1.

Although it made no reference to this evidence at the sentencing hearing, the State argues on appeal that this evidence supports the restitution order as it applies to the loss of the camera. Regarding the lost wages the State urges us to consider Brooks's trial

testimony that he was working at Irving when he investigated the stolen camera. Barden responds that Brooks did not suffer any lost wages because he investigated the stolen camera on company time.

In anticipation of an argument by the State that the restitution issue is waived because trial counsel did not object to the restitution order, Barden claims on appeal that the failure to object resulted in ineffective assistance of counsel. See Long, 867 N.E.2d at 618 (“The defendant’s failure to make a specific and timely objection to the trial court’s receipt of evidence concerning the amount of restitution constitutes a failure to preserve the matter and waives it as an issue for appeal.”). The State does not argue waiver; instead, it argues that we should remand for clarification of the amount of time and pay Brooks lost while investigating the stolen camera and for an order that the stolen camera cost \$189.99 not \$200.00. In the alternative, should we find that there is no evidence of Brooks’s lost wages, the State urges us to remand for a more specific determination of the loss of the camera.

In response, Barden argues that we should not remand and give the State a second bite at the apple to prove the losses. However, assuming that Barden did in fact receive ineffective assistance of counsel based on trial counsel’s failure to preserve the evidentiary issue during the sentencing hearing, the appropriate remedy would be to remand for a new sentencing hearing, not to vacate the restitution order as Barden suggests. See, e.g., Averhart v. State, 614 N.E.2d 924, 931 (Ind. 1993) (remanding for new sentencing hearing after finding ineffective assistance of counsel at sentencing hearing); Kellett v. State, 716 N.E.2d 975, 983 (Ind. Ct. App. 1999) (reversing and

remanding where defendant received ineffective assistance of counsel at sentencing hearing as to amount of restitution). Thus, given that Barden and the State both concede that Barden was improperly ordered to pay restitution, albeit for different reasons, we remand for the trial court to determine based on the existing evidence the value of the stolen camera and what if any lost wages Brooks suffered.

Conclusion

Barden has not shown that he received ineffective assistance of counsel. As for the restitution order, we remand to determine the cost of the camera and what if any lost wages Barden should be responsible for based on the existing evidence. We affirm in part, reverse in part, and remand.

Affirmed in part, reversed in part, and remanded.

FRIEDLANDER, J., and DARDEN, J., concur.